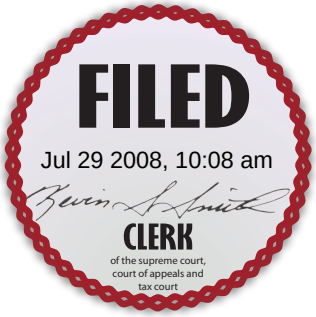

ATTORNEY FOR APPELLANT:

KENNETH R. MARTIN
Goshen, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ARTHUR THADDEUS PERRY
Special Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JERRY WHITE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0803-CR-115
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No.20C01-0701-FA-1

July 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, Jerry White was found guilty of attempted murder, a Class A felony; and eight counts of confinement, four as Class B felonies, two as Class C felonies, and two as Class D felonies. The trial court sentenced White to an aggregate sentence of eighty years. White raises the issues of whether sufficient evidence supports his conviction of attempted murder and two of his convictions of confinement as Class B felonies and whether his sentence is inappropriate. Concluding that sufficient evidence exists to support his convictions and that his sentence is not inappropriate, we affirm.

Facts and Procedural History

On the night of January 19, 2007, Kimberly Walker and her sister, Pamela Walker, returned to Kimberly's residence. Kimberly was with her four children, Ja.W., Ju.W., Ky.W., and Ka.W.; and Pamela was with her two children, N.T., and J.J., and her boyfriend, Lathie Turnage. Unbeknownst to anyone in the group, White, the father of Kimberly's children, was in the house. White used to live in the residence with Kimberly and the children, but Kimberly had asked White to move out in November or December of 2006.

Turnage, Pamela, and N.T. went into the front bedroom to lie down. A few minutes later, White entered the front bedroom, turned on the light, and told the three to come out of the room. After Pamela objected, White pulled out a handgun and repeated his demand. Pamela grabbed N.T. and began to exit the room, and Turnage began to get out of bed. White fired at Turnage, but missed. White then moved closer to Turnage and

fired again, this time striking Turnage in the left temple. Turnage fell back into the wall and then slumped to the floor.

Pamela began to run to the front door with N.T., but came back because she realized that White was with J.J. White was still holding a gun and waving it around. White instructed Pamela to sit on a couch, and she complied. Kimberly, Ka.W., and Ky.W. were also on the couch. Ja.W. and Ju.W. were on the floor in front of the couch in their sleeping bags. White collected cell phones. At some point, J.J. attempted to leave out the back door, but White demanded that he not leave the house.

At some point during the night, Turnage made a noise, and the group realized that he was not dead. Throughout the rest of the night and following morning, Pamela asked if she could get help for Turnage. White denied her requests.

Around 10:00 a.m. the following morning, White took Kimberly and their four children to a motel, where they stayed until January 23, when police discovered their location and apprehended White. As soon as White left the residence, Pamela called 911. Emergency responders transported Turnage to the hospital. Turnage survived, but suffered what appears to be permanent blindness.

The State ultimately charged White with attempted murder for shooting Turnage; four counts of Class B felony confinement, two with regard to Kimberly, and one each with regard to Pamela and Turnage; two counts of Class C felony confinement with regard to J.J. and N.T.; and two counts of Class D felony confinement with regard to Ju.W. and Ja.W.

On November 26 through 28, 2007, the trial court held a jury trial, at which the jury found White guilty of all counts. On December 20, 2007, the trial court held a sentencing hearing. After this hearing, the trial court issued a sentencing order[1] in which it found the following aggravating circumstances: (1) N.T., a young child, was in the room when White shot Turnage; (2) White left Turnage permanently blind; (3) White's attack on Turnage was unprovoked and occurred while Turnage was sleeping; (4) White's attempt to mislead police by giving them false information when he was first apprehended; (5) the substantial number of offenses committed by White during the instant incident; (6) six children were involved in the incident;[2] (7) the multiple adult victims; (8) White's actions in taking Kimberly and the children to the motel in an attempt to avoid apprehension; (9) White's refusal to allow anyone to seek medical assistance for Turnage, making him wait approximately nine hours after being shot to receive medical aid; (10) White's prior criminal history, which included a domestic battery conviction involving Kimberly; (11) prior attempts at rehabilitation have failed; (12) White's failure to himself seek medical assistance for Turnage; (13) White's threatening to kill Kimberly during the course of the incident; (14) White's attempt to flee when police attempted to apprehend him at the motel; (15) White's illegal acquisition of the firearm used in the incident; (16) White's confiscation of the victims' cell phones during the incident to prevent them from calling for assistance; (17) White's breaking into Kimberly's home and lying in wait; and (18) White's violation of a

[1] We commend the trial court for the detailed nature of its sentencing order. Such orders facilitate appellate review.

[2] The trial court recognized that the age of the victim was an element of some of the offenses, and "specifically decline[d] to recognize this as an aggravating circumstance in those cases." Transcript at 251.

position of trust with his children. As mitigating circumstances, the trial court found that White has a close relationship with his family, and that he appears to care for his children.[3]

The trial court then sentenced White to consecutive terms of fifty years for attempted murder, twenty years for one count of Class B felony confinement, and ten years for one count of Class B felony confinement. The trial court also sentenced White to concurrent terms of twenty years for a third count of Class B felony confinement, eight years for each count of Class C felony confinement, one and one-half years for each count of Class D felony confinement. The trial court found that the fourth count of Class B felony confinement merged with another count, and declined to enter judgment on that count. White now appeals his convictions of attempted murder and two counts of Class B felony confinement, and his sentence of eighty years.

Discussion and Decision

I. Sufficiency of the Evidence

A. Standard of Review

When reviewing a claim of insufficient evidence, we will not reweigh evidence or judge witnesses' credibility. Grim v. State, 797 N.E.2d 825, 830 (Ind. Ct. App. 2003). We will consider only the evidence favorable to the judgment and the reasonable inferences drawn therefrom. Id. We will affirm a conviction if the lower court's finding is supported by substantial evidence of probative value. Id.

[3] Although the trial court did not specifically identify these mitigating circumstances in its sentencing order, it stated that it "considers each factor mentioned by counsel for [White] to be a mitigating factor." Appellant's Appendix at 249.

Our supreme court has recently summarized our standard of review when assessing claims of insufficient evidence.

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted) (emphasis in original).

B. Attempted Murder

In order to sustain a conviction for attempted murder, the State must prove beyond a reasonable doubt two elements. "First, the defendant must have been acting with a specific intent to commit the crime, and second, he must have engaged in an overt act which constitutes a substantial step toward the commission of the crime." Spradlin v. State, 569 N.E.2d 948, 949 (Ind. 1991) (emphasis in original) (quoting Zickefoose v. State, 270 Ind. 618, 622, 388 N.E.2d 507, 510 (1979)).

"Because intent is a mental state, we have noted that intent to kill may be inferred from the deliberate use of a deadly weapon in a manner likely to cause death or serious injury." Henley v. State, 881 N.E.2d 639, 652 (Ind. 2008). "[F]iring a gun in the direction of an individual is substantial evidence from which a jury may infer intent to kill." Id. Here, White fired two shots at Turnage while standing a short distance away.

The second shot struck Turnage in the temple and was fired, as described by Turnage, "at point blank range . . . up on my head . . . . I still remember the gun touching my head." Tr. at 122. This evidence is sufficient to support an inference that White acted with the intent to kill Turnage. See Shelton v. State, 602 N.E.2d 1017, 1021 (Ind. 1992) ("A reasonable trier of fact could conclude beyond a reasonable doubt that [the defendant] intended to kill [the victim] when he raised a handgun at him and shot at him twice from distances of twelve and thirty feet, and that such action constituted a substantial step toward carrying out that intent."); Fry v. State, 885 N.E.2d 742, 750 (Ind. Ct. App. 2008) (concluding sufficient evidence existed based on a witness's testimony that he saw the defendant "raise his weapon, aim at [the victim] and begin shooting"), trans. denied; Perez v. State, 872 N.E.2d 208, 214 (Ind. Ct. App. 2007) ("[F]iring the gun at the passengers inside the tan Malibu, especially when considering his accuracy despite various impediments, is substantial evidence that [the defendant] intended to kill the victims."), trans. denied.

White argues the State's evidence was insufficient to support the specific intent element as "[l]acking from the State's proof was: any expression of prior animosity or bad blood between White and Turnage; any motive suggesting that White might have a reason or rationale for killing Turnage, or wanting Turnage dead." Appellant's Brief at 14. We recognize that under certain circumstances, the absence of motive may be "a significant exculpatory factor." Kiefer v. State, 761 N.E.2d 802, 806 (Ind. 2002). However, it is clear that "motive is not an element of the crime [of attempted murder]." Id. Kiefer involved a situation where a man fired a single shot from his porch in the

general direction of a boy walking past his house. Our supreme court noted that the evidence "reveal[ed] no motive or reason for [the defendant] to kill [the boy]." Id. The situation at bar is clearly distinguishable, as White knew Turnage, was in the process of ordering Turnage, Pamela, and N.T. out of the bedroom, and shot Turnage in his temple from close range.

White also argues that "if [he] had really intended to kill Turnage, he could have done it at any point thereafter." Appellant's Br. at 11. However, the fact that White may not have desired to kill Turnage as he lay bleeding in the bedroom does not affect the sufficiency of the evidence that White had the intent to kill Turnage at the time he fired the shots. See Zickefoose, 270 Ind. at 621, 388 N.E.2d at 509 (finding no merit in the argument "that since nothing interrupted him to prevent him from actually committing murder, and since his attack did not actually cause the victim's death, the evidence would only support a charge of battery and not attempted murder"); Vaughn v. State, 426 N.E.2d 113, 115 (Ind. Ct. App. 1981) ("In Indiana, the law of attempt focuses on the substantial step the defendant has completed, not on what was left undone." (citing Zickefoose)); cf. State v. Smith, 409 N.E.2d 1199, 1202 (Ind. Ct. App. 1980) ("The offense [of attempted murder] was completed with the first thrust of [the defendant's] knife. . . . [A]bandonment came too late.").

We conclude the State presented sufficient evidence from which the jury could reasonably infer beyond a reasonable doubt that White acted with the specific intent to kill Turnage.

C. Confinement

Next, White challenges his convictions of Class B felony confinement with respect to Pamela and Turnage. One commits the offense of confinement when one, knowingly or intentionally: "(1) confines another person without the other person's consent; or (2) removes another person, by fraud, enticement, force, or threat of force, from one (1) place to another." Ind. Code § 35-42-3-3(a). The offense is a Class B felony if it is committed while armed with a deadly weapon, results in serious bodily injury, or is committed on an aircraft. Ind. Code § 35-42-3-3(b)(2). "'[C]onfine' means to substantially interfere with the liberty of a person." Ind. Code § 35-42-3-1; see also Lyles v. State, 576 N.E.2d 1344, 1352 (Ind. Ct. App. 1991) ("The offense of confinement requires proof of a substantial interference with a person's liberty without the person's consent."), trans. denied.

1. Confinement of Pamela

Pamela testified that after White shot Turnage, she began to run out of the house with N.T., but stopped when she realized that J.J. was still in the house with White. She testified that when she entered the living room White "told us to sit on the couch," and that when he said this "he had [the gun] like waving, you know, ordering." Tr. at 75. White then told Pamela "to put N.T. down . . . and go back into the room where [Turnage] was," but that she did not do so because she thought White would kill her. Id. at 78. She also testified that she did not feel that she could leave the house, explaining: "[White] wouldn't let us leave. I asked to leave. He wouldn't let us go. He had a gun. He had already shot one person." Id. at 95.

White argues insufficient evidence supports his conviction of confinement with regard to Pamela as, after White shot Turnage, Pamela "could have left, but chose to come back out of a self-imposed duty to remain [with] her child." Appellant's Br. at 15. First, we note that Pamela's duty to care for her child is not "self-imposed," as "[a] parent is charged with an affirmative duty to care for his or her child." Lush v. State, 783 N.E.2d 1191, 1197 (Ind. Ct. App. 2003); see also Brown v. State, 770 N.E.2d 275, 279 (Ind. 2002) (recognizing the "parental duty to protect"). Further, even if, in a sense, Pamela voluntarily declined to flee from the residence in which White remained with her son, boyfriend, sister, nieces, and nephews, Pamela in no way consented to White's subsequent acts of confinement. See Williams v. State, 681 N.E.2d 195, 204 (Ind. 1997) ("While it may be true that the victim initially entered the car voluntarily, at some point in time she decided she wanted to leave."). We conclude sufficient evidence supports a finding that White substantially interfered with Pamela's liberty without her consent.

2. Confinement of Turnage[4]

White next argues that insufficient evidence supports his conviction of confinement with respect to Turnage, as after the shooting, Turnage "would seem to have been incapable of leaving the premises, or of having his liberty further restricted." Appellant's Br. at 16. We disagree.

[4] Although White does not explicitly argue that his conviction of criminal confinement with respect to Turnage, along with his conviction of attempted murder, violates double jeopardy, his argument implicitly raises such a concern. See Appellant's Br. at 16 ("[Turnage's] liberty was certainly restricted by the fact that he had been blinded by the shot, but after that, he would seem to have been incapable of leaving the premises, or of having his liberty further restricted."). We recognize that the evidence supporting White's conviction of confinement may not be the same evidence supporting his conviction of attempted murder. Cf. Tackett v. State, 642 N.E.2d 978, 979-80 (Ind. 1994) (recognizing that in order for convictions of murder and criminal confinement to stand, the confinement must "exceed[] that necessary to accomplish the murder"). Therefore, in determining whether sufficient evidence supports White's conviction, we will consider the evidence not necessary to support his attempted murder conviction and will cite cases addressing double jeopardy concerns raised by convictions of confinement and other crimes arising out of a single incident.

At trial, the following exchange took place between Turnage and the prosecutor:

> Q: Do you remember anything after being shot . . . ?
> A: I remember vomiting, you know. I remember vomiting and saying that I'm fucked up, you know. I'm fucked up. I need some help.

Tr. at 23. Both Pamela and Kimberly testified that they repeatedly asked White to allow them to call for help or leave to summon help for Turnage, but that White would not allow them to do so. Kimberly testified that at one point she saw Turnage "trying to come out of the room. He . . . fell against the door. [White] told him to sit down and be cool." Id. at 177.

From this evidence, it is clear that Turnage desired and requested medical assistance, and that due to White's actions, Turnage was denied such assistance. White's argument that Turnage would have been unable to leave the premises without assistance is unpersuasive. That Turnage ultimately required the assistance of others to leave the premises does not render White's actions insufficient to constitute confinement. Cf. Sweet v. State, 218 Ind. 182, 197, 31 N.E.2d 993, 999 (1941) (concluding that even though the victim "might not go outside the prison walls without the cooperation of the officials whose guest she was," she was still "detained" by the defendant, who held the victim in the prison's doctor's office and requested an automobile and weapons in exchange for her release). Classic confinement scenarios involve a victim being tied up or locked in a room, unable to escape without another's assistance. If anything, the fact that White rendered Turnage unable to leave by shooting him in the head makes his conduct more culpable than a typical offender.

Still, we recognize that there must be some evidence of some sort of confinement beyond that inherent in White's offense of attempted murder. Cf. Hopkins v. State, 747 N.E.2d 598, 606 (Ind. Ct. App. 2001) ("The confinement was initiated and executed independent of the subsequent robbery and it was properly charged and substantiated at trial as a separate occurrence."), trans. denied; Stover v. State, 621 N.E.2d 664, 668 (Ind. Ct. App. 1993) ("Where a rapist confines a victim beyond that integral to the act of rape, separate acts are committed and a defendant may properly be convicted of both rape and criminal confinement."); Polk v. State, 578 N.E.2d 687, 691 (Ind. Ct. App. 1991) (holding that robbery and confinement were distinct criminal acts where "the force used to coerce [the victim] to remain in the alley . . . was different from the force used to effectuate the robbery").

First, we conclude that White's actions in confining everyone in the house and refusing to allow anyone in the house to summon help for Turnage constitute "force beyond that inherent in the actions forming the basis of the attempted murder conviction." Grafe v. State, 686 N.E.2d 890, 895 (Ind. Ct. App. 1997), reh'g granted in part, trans. denied. Our supreme court has previously found sufficient evidence to support a conviction of confinement based on an offender's actions with respect to people other than the victim. See Warfield v. State, 275 Ind. 396, 400, 417 N.E.2d 304, 307 (Ind. 1981) (holding that a five-year-old "was confined by [the defendant's] actions in tying and holding her family in confinement at gunpoint"); see also Creek v. State, 588 N.E.2d 1319, 1320 (Ind. Ct. App. 1992) (holding that a sleeping child was confined by the defendant's actions of telling the child's mother that if she did not go to his estranged

wife's house and return with his wife the defendant would kill the child), trans. denied. By confining the others and not allowing them to accede to Turnage's request for help, White effectively denied Turnage the ability to leave the residence and obtain help.

We also reject White's implied argument that, as he had already rendered Turnage blind and substantially immobilized, his further acts were insufficient to constitute a substantial restriction on Turnage's liberty. The fact that a victim's impaired or vulnerable condition allows the offender to expend less effort confining that victim does not excuse the conduct. Cf. Taylor v. State, 879 N.E.2d 1198, 1203 (Ind. Ct. App. 2008) ("That the victims are relatively helpless does not absolve the defendant of liability for kidnapping.").[5] That Turnage recalls little of the events following the shooting likewise does not excuse White's conduct in depriving Turnage of the means to leave the residence, as we have previously held that the victim does not need to be aware that he or she is being confined, Creek, 588 N.E.2d at 1320.

In sum, we conclude the evidence supports White's conviction of confinement. After shooting Turnage, White remained in the residence for roughly nine hours. He collected all the victims' cell phones and allowed no one to leave the residence or communicate with the outside world. That White had already severely injured Turnage does not mean that he did not substantially restrict Turnage's liberty through his subsequent actions.

[5] Confinement is an element of kidnapping. See Ind. Code § 35-42-3-1(a).

II. Sentencing

A. Standard of Review

"Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution 'authorize independent appellate review and revision of a sentence imposed by the trial court.'" Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007) (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)), clarified on reh'g, 875 N.E.2d 218. When reviewing a sentence imposed by the trial court, we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). When determining whether a sentence is inappropriate, we recognize that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). We must examine both the nature of the offense and the defendant's character. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When conducting this inquiry, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. The burden is on the defendant to demonstrate that his sentence is inappropriate. Childress, 848 N.E.2d at 1080.

B. Nature of the Offenses and Character of the Offender

Here, White's aggregate sentence of eighty years consists of a maximum fifty-year sentence for attempted murder, a maximum twenty-year sentence for confinement of Kimberly, and an advisory ten-year sentence for confinement of Pamela. The sentences for White's other offenses are concurrent to these three sentences. In arguing his sentence is inappropriate, White points out that he has only one prior felony, that "although [he] did not permit other adults to obtain medical care for Turnage, he did ask Pamela to look in on Turnage, and take him towels," and that he "was polite at the time of the arrest." Appellant's Br. at 19.

In regard to the nature of the offense, White basically rendered nine people prisoners for a period of nine hours. Six of these people were children, four of them his own. Without any apparent provocation, he shot Turnage at close range, leaving Turnage permanently blind. This shooting took place in the presence of Turnage's young child. He then showed further disregard for Turnage's well-being by denying him the ability to receive medical treatment. After leaving the residence, he continued to keep Kimberly and four children captive in a motel room. As noted above, the trial court found many other circumstances rendering White's offense particularly egregious.

In regard to White's character, he has convictions in Illinois of possession of cannabis, violation of a protective order – domestic battery, criminal trespass, kidnapping, and domestic battery. Although this is not the lengthiest history we have seen, it is a far cry from a history that comments favorably on White's character. Indeed, as the instant charges are substantially related to his previous charges of kidnapping and

domestic battery, this history comments negatively on White's character. See Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006) (recognizing that the weight of a defendant's criminal history "is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability").

We agree with the trial court's assessment of White and his offense, and have little trouble concluding that White has failed to meet his burden of persuading this court that his sentence is inappropriate.

Conclusion

We conclude that sufficient evidence supports White's convictions and that his sentence is not inappropriate.

Affirmed.

BAKER, C.J., and RILEY, J., concur.